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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL TYRAN HALL, Defendant and Appellant.	C055858 (Super. Ct. No. 05F07248)

A jury found defendant Michael Tyran Hall guilty of possessing cocaine for sale. The trial court found he had one prior strike, one prior conviction for possessing cocaine base for sale, and two prior prison terms. He was sentenced to 11 years in prison.

Defendant appeals, raising contentions relating to the search of his house, jury instructions, evidence, prosecutorial misconduct, ineffective assistance of counsel, and his sentence. Finding no merit in these contentions, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution

On May 17, 2005, defendant and two others were shot as they sat in a GMC Yukon parked in the driveway of a house on Glassboro Way in Sacramento. Police searched the home. Inside the master bedroom was a shoebox containing 476 grams of cocaine, enough for 4,700 people to get "high." The cocaine had a street value of between $8,000 and $11,000. Next to the shoebox was a letter addressed to defendant dated February 2005. In between the mattress and box spring of the bed was a loaded .45-caliber Ruger. Next to the bed was a file folder that had defendant's current "California ID card," a current insurance policy for defendant and his wife Ronisha Hall, and a receipt for $1,900 in furniture purchased by defendant on April 21, 2005, listing the Glassboro Way house as his address. Also in the house was $24,516 in cash, mainly in $20 bills.

B

The Defense

According to defendant's mother (Levette Hall), his father (Bayard Hall), his sister-in-law (Ronae Proctor), and his mother-in-law (Rona Buckner), in March or April 2005, defendant separated from his wife and moved into his parents' home in Yuba City. After defendant moved out, Ronisha Hall lived at the Glassboro Way house with Buckner, Proctor, another one of Buckner's daughters named Italy Dalton, and defendant and Ronisha Hall's daughter.

On the night of the shooting, defendant came to the Glassboro Way house to pick up Ronisha Hall to take her to a casino. Buckner heard defendant drive up in his Yukon GMC but did not hear any car doors open or close. About five minutes after defendant parked, Buckner heard five or six gunshots.

When police came to the house to investigate the shooting, Buckner did not tell them defendant no longer lived there. In a declaration she provided one year after the shooting, Buckner again did not state that fact. However, the purpose of the declaration was not to ascertain whether defendant lived at the Glassboro Way residence, but rather, to ascertain whether police "had a right to go in the house for a search warrant." Similarly, Proctor did not tell police that defendant no longer lived there. She also did not state that fact in a declaration she provided, but the purpose of the declaration had to do with "what the police did that night right after the shooting." She did not tell anybody that defendant no longer lived at Glassboro Way until she took the witness stand at defendant's trial.

Similarly, from the time Bayard Hall found out his son was arrested to the time of his trial testimony, Hall never volunteered information to anybody, including the police, about his son's living arrangements. When Hall signed a declaration in November 2005, he did not state that his son was not living at the Glassboro Way residence, but the purpose of the declaration was to provide bail funds to secure defendant's release from jail, so nobody asked him where his son lived.

DISCUSSION

I

The Court Did Not Err In Denying Defendant A Franks Hearing

Defendant contends the court erred in ruling he was not entitled to a hearing pursuant to *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667] (*Franks*) to challenge the veracity of the statements contained in the affidavit of probable cause, because the affidavit used to secure the search warrant contained material omissions that amounted to reckless disregard for the truth. He further claims that the good faith exception to the warrant requirement could not save the search. As we explain, there were no material omissions in the affidavit warranting a *Franks* hearing. Accordingly, we do not reach the good faith issue.

A

The Search Warrant Affidavit

Sacramento County Deputy Sheriff Michael Abbott set forth the following information in his statement of probable cause in support of his request for warrant to search 5704 Glassboro Way and a GMC Yukon and Oldsmobile Cutlass that had been parked in the driveway.

At 11:24 p.m. on May 17, 2005, while in the area of Greenholme Drive, deputies heard shots fired.[1] Deputies went to 5704 Glassboro Way, not far away, and found three people outside

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[1] Greenholme Drive is .04 miles from Glassboro Way, where defendant's house was located.

who had been shot -- defendant, Andre Hellams, and Gabriel Gochez. The injuries to defendant and Hellams were life threatening. The two cars in the driveway -- a GMC Yukon and an Oldsmobile Cutlass -- had bullet holes. There was blood inside the Yukon. The three people who had been shot "did not state they saw who shot them and were not all able to provide a statement regarding the shooting due to their injuries." All three were taken to the hospital by ambulance. A doctor at the hospital found in defendant's sock cocaine that weighed less than one gram.

A neighbor, Cheryl Githens, heard the shooting and looked out her bathroom window. She saw a "female" with a gun in hand in front of the house. One of the shooting victims told the female to call 911, so the female "went towards the front door of the residence." There was a trail of blood from the driveway to the front door.

The house was defendant's residence where he lived with his wife, Ronisha Hall, and their daughter. Also living in the house were Ronisha Hall's mother, Rona Buckner, and Ronisha Hall's two sisters, Italy Dalton and Ronae Proctor.

Ronisha Hall had gone to the hospital "for her husband" and spoke with one of the deputies over the telephone. She said she would tell him where a gun was located in the house, but she never did.

A record check showed that defendant had a prior felony conviction for possession for sale of rock cocaine and was sentenced to prison.

Deputy Abbott requested a warrant that was "night serviceable" because, among other things, Ronisha had "access to any evidence in the residence" and if not seized immediately, the evidence might be concealed or destroyed. He wanted to search the house for firearms, spent shell casings, and live ammunition, and for evidence defendant lived in the house and cocaine sales and manufacturing were taking place there.

Based on these recitations, a magistrate issued a search warrant for the house and the cars.

B

Defendant's Motion To Traverse And Quash The Search Warrant And Suppress The Evidence Against Him

Defendant filed a motion to traverse and quash the search warrant and suppress the evidence against him, contending the search warrant was based on "deliberately or recklessly omitted material facts" and was not supported by probable cause. Included in the motion were declarations from Buckner, Proctor, and Dalton.

The declarations stated the following: Buckner, Proctor, and Dalton were living at Ronisha Hall's house on May 17, 2005. That night, they heard gunshots. The officers entered the home without permission and some of them began searching the house. The officers would not let them move freely around the house or leave because they were waiting for a search warrant.

Based on these declarations, defendant contended the affidavit failed to state that deputies had "secured" the house, searched it, and found nothing. Defendant also contended the

affidavit failed to identify the doctor who found the cocaine in defendant's sock, failed to note that the shells and casings at the scene were from a rifle, and created the false impression that the unidentified female with the gun was the person who fired the shots.

C

Trial Court's Ruling

The trial court held that defendant was not entitled to a *Franks* hearing because these omissions were not reckless or deliberate and would not have changed its determination of probable cause to issue the search warrant.

D

The Court Did Not Err In Denying Defendant A Franks Hearing

On appeal, defendant again contends he was entitled to a *Franks* hearing because of omissions in the search warrant. He focuses on the failure to corroborate the tip from the unnamed doctor who discovered the cocaine in defendant's sock and omission of important facts in the affidavit such as a "thorough[]" search of the house had already taken place revealing no guns or drugs, the spent shells were from a rifle, the shots came from a direction other than the house, and Ronisha Hall could not have returned to the house to destroy evidence. As we explain below, defendant has failed to show he was entitled to a *Franks* hearing.

Some of these omissions were not material to the determination of probable cause. As to the unnamed doctor, defendant likens the scenario to a confidential informant who is

untested and unreliable. He contends the officers should have corroborated the "tip." This analogy is misplaced. A doctor who is attending to a seriously injured patient has no real reason to manufacture evidence against the patient. As to the alleged "thorough[]" search of defendant's house, the declarations provided by defendant show that the search was simply a cursory one where the officers looked around with flashlights near objects such as the television and the officers did state they were waiting for a search warrant and then would "start the search."

As to the omission that the only spent shells found were from a rifle, defendant presented no evidence the officers knew this information at the time they sought the search warrant. The supporting evidence in defendant's motion consisted of excerpts of a police report cataloging spent rifle shells found at the scene, but there was no indication from those excerpts when the shells were found. As such, there was no evidence of an omission at the time the affidavit was written, let alone a deliberately false or reckless omission.

As to the other allegations, there were not the omissions defendant claims there were. He states the affidavit "did not reveal . . . the shots came from a direction other than the house." Not so. The affidavit specifically stated, "[d]eputies heard shots fired from the area of Greenholme Drive," which was not the street on which the house they sought to search was located. He also alleges the affidavit incorrectly stated Ronisha Hall could have returned home and destroyed evidence,

but that was "impossible" because she was at the hospital and the police had secured the house. Again, not so. The affidavit forthrightly stated that a deputy had talked with Ronisha Hall "on the telephone" and that she "had gone to the hospital for her husband." And even under defendant's version of events as presented in the declarations, three adults were still inside the house and a gun tied to an unidentified woman was still missing. There was nothing misleading about the affidavit in this regard.

In sum, defendant failed to establish the allegedly omitted information was either material to a finding of probable cause or was, in fact, omitted from the affidavit. As such, the court properly denied defendant's request for a *Franks* hearing.

II

The Warrant Was Supported By Probable Cause

Notwithstanding the alleged omissions in the search warrant affidavit, defendant contends the warrant was issued without probable cause. Citing *People v. Pressey* (2002) 102 Cal.App.4th 1178, he argues "the only evidence in the affidavit of [his] committing a crime was the allegation that he had a small amount of cocaine in his sock. . . . This single bald fact did not establish probable cause to believe that cocaine would likely be found in his home." He further argues there was nothing in the affidavit to suggest there would be evidence inside the house of the shooting, which took place outside. As we explain, he is wrong.

To determine whether probable cause supports issuance of a search warrant, the magistrate makes "a practical, common-sense decision" whether, given "all the circumstances" in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [76 L.Ed.2d 527, 548].) "And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (*Id.* at pp. 238-239 [76 L.Ed.2d at p. 548].) We pay "'great deference'" to the magistrate's determination. (*Id.* at p. 236 [76 L.Ed.2d at pp. 546-547].) "Doubtful or marginal cases are to be resolved by the preference to be accorded to warrants." (*People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1716.)

Under this standard of review, we find the magistrate had a substantial basis for concluding that probable cause existed, i.e., that there would be evidence of current drug-related activity at defendant's house. Defendant was a convicted cocaine dealer who had cocaine on his person in front of his home. He had just been shot, along with two others, in front of his home. A gun possibly used in defense of the shooting was missing, and the person who was last seen with the gun was walking toward defendant's house. Under these circumstances, it was reasonably probable that drugs and a gun would be found in defendant's home.

This scenario presents a different picture than *Pressey*, the case on which defendant relies. There, the appellate court

held that probable cause a person uses illegal drugs does not automatically provide probable cause for a warrant to search the person's home for those drugs. (*People v. Pressey*, *supra*, 102 Cal.App.4th at p. 1181.) The magistrate had found probable cause to search Pressey's home for drugs and paraphernalia based on defendant's arrest during a traffic stop for possession of a controlled substance and an officer's opinion that drug users with controlled substances on their person or in their car are likely to have more of those substances where they live. (*Id.* at pp. 1181-1182.) In reversing, the appellate court explained: "This does not mean that probable cause to search a home could never arise from the particularized suspicions of an experienced narcotics officer, or the circumstances of an arrest for drug possession, only that illegal drug use does not necessarily provide probable cause to search the user's residence, and that such cases must be decided on their own facts." (*Pressey* at p. 1190.) As we have just explained, this case presented more than just the bare fact of defendant's possession of cocaine. It involved possession of cocaine by a convicted drug dealer in front of his house, a serious shooting, and a missing gun. On these facts, there was probable cause to issue the search warrant.

III

The Court's Misreading Of CALCRIM No. 226 Regarding Witness Credibility Was Not Prejudicial

At the beginning of trial, the court misread CALCRIM No. 226 regarding witness credibility. Instead of instructing

jurors they "should consider" not believing anything a witness said if they decided a witness deliberately lied about something significant in the case, the court instructed them they "must not" believe anything that witness said. Defendant contends this was prejudicial error. Not so.

Our Supreme Court has held that "the misreading of a jury instruction does not warrant reversal if the jury received the correct written instructions." (*People v. Prieto* (2003) 30 Cal.4th 226, 255.) Here, at the end of witness testimony, the court reread CALCRIM No. 226 correctly and distributed a correct written version of the instruction. On this record, defendant's argument of prejudicial error fails.

IV

The Court Did Not Err In Admitting Evidence Regarding The Contents Of Defense Witnesses' Declarations

Defendant contends the court violated his "due process right to a fair trial" when it allowed the prosecutor to "impeach[]" defense witnesses Buckner, Proctor, and Bayard Hall with their declarations that failed to mention defendant did not live on Glassboro Way. Although defendant frames the issue as a constitutional one, the issue is an evidentiary one in which we, as the reviewing court, decide whether the trial court abused its discretion in admitting the evidence. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Ayala* (2000) 23 Cal.4th 225, 301.) The answer is "no."

Here, the "disputed fact . . . of consequence" (Evid. Code, § 210) was whether defendant lived on Glassboro Way and

therefore was responsible for the drugs found at the home. Buckner, Proctor, and Bayard Hall testified he did not. One piece of evidence "relevant to the[ir] credibility" (Evid. Code, § 210) was why they waited so long to make this claim. It was not "irrelevant, confusing, and misleading" as defendant states, to use the omission of this claim in their declarations to test their credibility on this issue, especially in light of the "wide latitude" allowed in cross-examination to test witness credibility. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.) While defendant makes much of the fact there were reasons not to include this information in the declarations, the court specifically allowed the witnesses to explain why the declarations might not contain this information, so as not to create a misleading picture of the declarations.[2] On this record, the court did not abuse its discretion in admitting the evidence.

V

The Prosecutor Did Not Commit Misconduct,

And Trial Counsel Was Not Ineffective

In related arguments, defendant contends the prosecutor committed numerous instances of misconduct and its cumulative effect denied him a fair trial. Specifically, defendant alleges

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[2] For example, Buckner, Proctor, and Bayard Hall testified their declarations omitted that defendant did not live on Glassboro Way because they were not asked that question and it was not germane to the declarations. The court also agreed to allow defendant's former attorney to testify as to the purpose of the declarations.

the following acts of prosecutorial misconduct: (1) arguing that defense witnesses should not be believed because their declarations failed to state defendant did not live on Glassboro Way; (2) arguing falsely the declarations were a chance for witnesses to say that defendant was not guilty; (3) unfairly arguing that Proctor testified to hearsay; and (4) arguing facts outside the record, including that defense witnesses never revealed to the prosecutor prior to trial that defendant did not live on Glassboro Way. Despite the lack of objection to the prosecutor's closing argument, we address these contentions because defendant alleges his counsel was ineffective for failing to object.

As to the first two instances of alleged misconduct, counsel was not ineffective because, as we have already explained, the court did not err in admitting evidence about the declarations. Moreover, defense counsel elicited from the witnesses that they were not asked questions relating to where defendant lived at the time they helped prepare the declarations, so the jury understood why the witnesses would not have offered this information. That explanation apparently sufficed for counsel, as he reasonably chose not to call defendant's former attorney to the stand to further explain the purpose of the declarations.

As to the third instance of alleged misconduct, counsel was not ineffective for failing to object because the prosecutor was correct that Proctor's source of knowledge was not personal. The portion of closing argument about which defendant complains

was the prosecutor's statement that Proctor "got up there and she testified that [defendant] moved in with his parents in Yuba City," her testimony was hearsay, and "she was willing to stand up there and state it like it was the truth and she knew it." This was a fair characterization of what happened at trial. When asked by defense counsel if she knew where defendant moved to, Proctor stated, "I believe he moved with his --." The prosecutor objected, and the court overruled the objection. Procter then testified that defendant moved in with defendant's mother and father. On cross-examination, the prosecutor elicited from Proctor that she had "no first hand-knowledge" "[a]s far as where [defendant] moved" and had learned that because somebody had told her. On this record, we will not fault defense counsel for failing to object to the prosecutor's closing argument.

We come then to defendant's final allegation of prosecutorial misconduct, arguing facts outside the record, namely, that defense witnesses never revealed to the prosecutor prior to trial that defendant did not live on Glassboro Way. The argument that defendant takes issue with is as follows: "Why didn't they tell us this before the beginning of the trial and before you were selected? The first time we got to hear it actually is when [defense counsel] got up to give his opening statement. [¶] Interesting though, isn't it? How did [defense counsel] know to give all of those witness statements in his opening statement if they hadn't even talked to him yet, because you recall that statement was given prior to any of them

testifying. It all shows it is a fabricated bunch of lies . . . ." Defendant faults counsel for failing to object to the argument as misconduct, but he parses the argument too finely: the point of the prosecutor's argument was that it defied logic that defense witnesses would have withheld for so long evidence defendant was not living on Glassboro Way. The evidence supported this argument. That an isolated word or phrase having to do with the prosecutor's personal knowledge could be taken as arguing evidence outside the record did not rise to the level of misconduct because it did not involve a pattern of conduct so egregious nor did it involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) Again, on this record, we cannot fault defense counsel for failing to object.

As we have found no "repeated instances of improper argument" by the prosecutor as defendant claims, we reject his contention that such argument deprived him of a fair trial.

VI

The Court Did Not Abuse Its Discretion
In Refusing To Dismiss Defendant's Strike

Defendant contends the court abused its discretion in refusing to dismiss his strike because it gave "short shrift to the fact that [he] had been shot, needed full-time medical care as a paraplegic, and would never walk again," and instead rested its decision on his criminal history.

The trial court's ruling was not an abuse of discretion. As the court correctly recognized, defendant's prior strike was a 1995 voluntary manslaughter for which he received only three years in prison. Shortly after being released, he returned to a "lifestyle that he had been participating in prior to the homicide" and was subsequently convicted of possessing cocaine for sale in 2001 and sentenced to four more years in prison. With both sentences, he received a "substantial break" and yet failed to "turn things around." On this record, the court had a reasonable basis for not exercising its discretion to dismiss defendant's strike, and we reject defendant's argument.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.